

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BURBANK MALL ASSOCIATES, LLC,

Plaintiff and Respondent,

v.

GEORGIOU STUDIO, INC.,

Defendant and Appellant.

B202847

(Los Angeles County
Super. Ct. No. EC045260)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Daggenhurst Zakari, Raymond Zakari, Richard Daggenhurst and Jessica Trotter for Defendant and Appellant.

John P. Byrne and Sherin Hackman for Plaintiff and Respondent.

INTRODUCTION

This is an unlawful detainer action. The tenant appeals from a judgment in favor of the landlord and an order denying the tenant's petition for relief from forfeiture. We affirm.

BACKGROUND

1. *The Lease*

Plaintiff and respondent Burbank Mall Associates, LLC (Landlord) is the owner of certain commercial real property in Burbank, California, known as the Burbank Town Center (the Mall). In March 2005, Landlord entered into a lease (Lease) with defendant and appellant Georgiou Studio, Inc. (Tenant). Under the Lease, Landlord granted Tenant possession of Space No. 222 in the Mall for use as a women's clothing store until the end of January 2015. The Lease provided that Tenant was required to complete construction work at Space No. 222 in accordance with certain requirements. Of relevance here, Tenant's contractor was required to maintain certain levels of worker's compensation, general liability and vehicle liability insurance coverage.

2. *The Lease Amendment*

Effective July 20, 2006, Landlord and Tenant entered into Lease Amendment No. 1 (Lease Amendment), which modified the Lease. The Lease Amendment provided that Tenant would surrender Space No. 222 no later than June 14, 2006 (Surrender Date), and move to new premises within the Mall (Relocation Premises or premises). The Lease Amendment further provided that the rent due under the Lease "shall temporarily abate for a period [(Rent Abatement Period)] commencing on the Surrender Date, and continuing through and including the earlier to occur of: (i) the date Tenant opens for business in the Relocation Premises or (ii) sixty (60) days . . . following the date Landlord delivers possession of the Relocation Premises to Tenant for the performance of Tenant's Work therein (such applicable date being herein referred to as the 'Relocation Date')."

The Lease Amendment also stated: "Landlord agrees to deliver possession of the Relocation Premises to Tenant upon full execution of this Agreement. Tenant agrees to

accept such delivery of the Relocation Premises in its ‘as-is where-is’ condition and to perform ‘Tenant’s Work’ (hereinafter defined) therein diligently and promptly. Tenant will remodel the Relocation Premises including, at Tenant’s option, the installation of a ‘pop-out’ storefront measuring approximately twenty-nine inches (29”) in width and forty-one feet (41’) in length (‘Tenant’s Work’), at Tenant’s sole cost and expense”

3. *Delivery of the Premises to Tenant*

On July 24, 2006, Landlord delivered a letter to Tenant, wherein Landlord stated: “This letter shall serve as notice that [the Relocation Premises] is now available and is delivered to Tenant effective **7/24/06** for the commencement of Tenant’s Work. The Relocation Date shall be **the Earlier of September 22, 2006 (60 days from date of delivery of space) or the Date tenant opens for business** as more particularly set forth in the Lease.”

Tenant’s regional manager Mary Nichols testified that on several occasions between July and early September 2006, she asked Landlord’s operation manager Sal for the keys to the Relocation Premises. Nichols further testified that Sal declined her requests, and that he stated that Tenant would not be provided keys until Tenant submitted and Landlord approved plans for Tenant’s Work.¹ Tenant, however, was given access to the premises. Tenant’s CEO George Georgiou testified that Landlord allowed Tenant into the premises if Tenant went through the Mall’s office. Mr. Georgiou further testified: “If we wanted to get in again, there was no problem with us getting in, as long as we went through the office and had somebody with us to go in the space.”

Tenant retained a general contractor to perform the Tenant’s Work in August 2006. Landlord, however, would not permit Tenant’s contractor to begin construction until the contractor obtained the insurance required by the Lease. Tenant provided proof of such insurance to Landlord in mid-September 2006. On September 20, 2006, Landlord provided the keys to the premises to Tenant. Tenant’s contractor began

¹ Landlord’s general manager Alan Osadchey testified that prior to the delivery of the keys to Tenant, he was never asked by Tenant for possession of the keys. Had he been asked, Osadchey claims, he would have turned over the keys to Tenant.

construction on the next day. Tenant opened for business on the day after Thanksgiving in 2006, approximately two months after Tenant was given the keys to the premises.

4. *Notice of Pay or Quit*

On July 6, 2007, Landlord served Tenant with a Three-Day Notice to Pay Rent or Quit (Notice).² In the Notice, Landlord demanded that Tenant pay Landlord \$32,300, the amount of rent Landlord estimated was due under the Lease. The Notice further stated that if Tenant did not pay that amount within three days, Tenant was required to deliver possession of the premises, and that Landlord would declare the Lease forfeited. Tenant sent a partial payment of approximately \$7,300 to Landlord but did not pay the entire amount Landlord claimed was due within three days. Tenant did not surrender possession of the premises as demanded in the Notice.

5. *The Unlawful Detainer Action*

On July 17, 2007, Landlord filed a Complaint for Unlawful Detainer against Tenant. After a bench trial, the court entered judgment on September 6, 2007, in favor of Landlord and against Tenant. The judgment granted Landlord possession of the premises, past rent due and holdover damages in the amount of \$27,365.09, as well as attorney's fees and costs.

Subsequently, Tenant filed a petition for relief from forfeiture due to hardship, which was denied by the trial court on October 4, 2007. This appeal followed.

CONTENTIONS ON APPEAL

Tenant claims that the amount of rent demanded in the Notice was excessive. Landlord assumed that the Rent Abatement Period ended on or about September 22, 2006, and calculated rent due beginning on that day through the date of the Notice. This assumption was based on Landlord's contention that possession of the premises was

² At oral argument Tenant claimed that the Notice was defective because the Lease purportedly required a five-day notice to pay or quit. Tenant, however, did not raise this issue at trial or in its briefs with this court. This argument thus has been waived.

delivered to Tenant on July 24, 2006.³ Tenant contends that Landlord did not deliver possession of the premises until it provided Tenant with the keys on September 21, 2006.⁴ Thus, Tenant argues, Landlord could not begin charging rent until 60 days after September 22, 2006, that is, until November 21, 2006.

Tenant contends that Landlord's failure to correctly state the amount of rent due under the Lease was fatal to Landlord's unlawful detainer claim. "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. [Citations.] Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697.)

A three-day notice must contain "the amount which is due." (Code Civ. Proc., § 11621, subd. 2.) "A notice that seeks rent in excess of the amount due is invalid and will not support an unlawful detainer action." (*Levitz Furniture Co. v. Wingtip Communications, Inc.* (2001) 86 Cal.App.4th 1035, 1038.) A landlord of commercial real property, however, can satisfy this requirement by stating a reasonable estimate of the rent due on its notice. (Code Civ. Proc., § 1161.1, subd. (a); *WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 526.) "[T]here is a presumption affecting the burden of proof that the amount of rent claimed . . . is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed . . . was no more than 20 percent more or less than the amount determined to be due." (Code Civ. Proc., § 1161.1, subd. (e).)

³ The Lease Amendment provided that rent shall temporarily abate from the Surrender Date "through *and including* the earlier to occur of (i) . . . (ii) sixty (60) days . . . following the date Landlord delivers possession of the Relocation Premises . . ." (Italics added.) Hence, if Landlord delivered possession of the Relocation Premises to Tenant on July 24, 2006, Tenant's obligation to pay rent would have begun 61 days later, i.e., on September 23, 2006. We cannot ascertain from the record whether the Notice sought rent beginning on September 22 or September 23, 2006.

⁴ As noted above, the record indicates that the keys were actually delivered on September 20, 2006.

Here, monthly rent was \$8,410.40. Thus, if rent was abated for an additional two months, as Tenant contends, Tenant owed less than 50% of the \$32,300 Landlord claimed in the Notice. Tenant contends that Landlord's alleged overstatement in the Notice of the amount of rent due makes the Notice "defective and void, and makes it incapable of sustaining an unlawful detainer."

Tenant's second argument is that the trial court abused its discretion by denying its petition for relief from forfeiture. For the reasons stated below, we find both arguments unpersuasive.

DISCUSSION

1. *The Notice Was Not Void*

Tenant's claim that the Notice was void depends on whether the Rent Abatement Period ran from June 14, 2006 to September 22, 2006, as Landlord contends, or from June 14, 2006 to November 21, 2006, as Tenant contends. This issue requires us to interpret the meaning of the Lease and Lease Amendment. Where, as here, there are no disputed material facts, we review the meaning of a contract, including a lease, *de novo*. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267.) We conclude that the Notice was not void because the Rent Abatement Period ended on or before September 22, 2006.

" 'The duty of the landlord to deliver possession of the demised premises to the tenant, in order to entitle him to the payment of rent, does not extend to the point of requiring actual delivery, and his covenant is satisfied if there is no impediment to the tenant's taking possession *or if the tenant is given a legal right of entry and enjoyment during the term.*' " (*Reynolds v. McEwen* (1952) 111 Cal.App.2d 540, 542-543, italics added; see also *Farmers & Merchants' Nat. Bk. v. Bailie* (1934) 138 Cal.App. 143, 148 [holding that landlord was entitled to collect rent even though tenant did not have possession of the premises and landlord failed to remove buildings on the premises as required by the lease].) Here, under the express terms of the Lease Amendment, Tenant had the legal right to possession of the Relocation Premises as of the date the Lease

Amendment was executed, that is, as of July 20, 2006. Therefore, Landlord's right to collect rent commenced on that date, though rent was temporarily abated for 60 days.⁵

Tenant claims that Landlord's delay in delivering the keys denied Tenant "unrestricted and exclusive" possession of the premises for a period of about two months. Tenant further claims that the delay caused Tenant harm in a number of ways. Mr. Georgiou testified that Tenant would have started construction earlier and, as a result, opened its store sooner, if Tenant had been given the keys to the premises prior to September 20, 2006.⁶ Ms. Nichols testified that had she obtained the keys sooner, she would have set up her office and worked at the premises on an earlier date.

Tenant claims that Landlord's delay in delivering the keys was a breach of the Lease Amendment but does not specify a provision of the Lease Amendment that was breached. Tenant has not cited, and we have not found, anything in the Lease, as amended, that specifically refers to the delivery of keys. However, "[i]n the absence of language to the contrary, *every lease* contains an implied covenant of quiet enjoyment, whereby the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises." (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 588 (*Andrews*)). "The covenant of quiet enjoyment 'insulates the tenant against any act or omission on the part of the landlord, or anyone claiming under him, which interferes with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy. [Citations.]' " (*Ibid.*)

⁵ The record does not clearly indicate why Landlord purported to deliver possession of the premises on July 24, 2006. Apparently the premises were not "available" prior to that date. In any case, this purported modification of the Lease Amendment worked in Tenant's favor because it delayed the date Landlord began charging rent.

⁶ We found no evidence in the record, however, that Landlord's refusal to deliver the keys to Tenant prevented Tenant from commencing construction. Rather, it appears that construction was delayed due to Tenant's failure to (1) obtain Landlord's approval of construction plans and (2) submit proof of its contractor's insurance.

In general, the landlord's covenant of quiet enjoyment and the tenant's covenant to pay rent are mutually dependent; i.e., the tenant is not required to pay rent if he is denied possession. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846-847 (*Swords*).) Thus, if a landlord physically evicts a tenant, the tenant's obligation to pay rent ceases. (*Id.* at p. 846.) "However, when the [landlord's] act of molestation merely affects the tenant's beneficial use of the premises, the tenant is not physically evicted and he has a choice in the matter. He can remain in possession and seek injunctive or other appropriate relief or he can surrender possession of the premises within a reasonable time thereafter. If the tenant elects to remain in possession, his obligation to pay rent continues unless the landlord has breached some other express or implied covenant which the covenant to pay rent is dependent upon. [Citations.] If, on the other hand, the tenant elects to surrender possession of the premises, a *constructive* eviction occurs at that time and, as in the case of an actual eviction, the tenant is relieved of his obligation to pay any rent which accrues thereafter."⁷ (*Id.* at p. 847.)

We need not decide whether Landlord breached the implied covenant of quiet enjoyment,⁸ because assuming arguendo it did, Tenant still had an obligation to continue paying rent to Landlord. Tenant elected to remain in possession of the premises despite Landlord's alleged interference with its unrestricted access thereto. As a result, Tenant was not constructively evicted, and its obligation to pay rent continued. (*Swords, supra*, 48 Cal.App.3d 847-848; *In re Axton* (9th Cir. 1981) 641 F.2d 1262, 1267.) Landlord's Notice, therefore, did not overestimate the amount of rent due and was not void.

⁷ The tenant also has the option of standing on the lease and suing for damages. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 140.) In this case, Tenant did not seek damages from Landlord or an offset from the rent Landlord claimed was due.

⁸ "Minor inconveniences and annoyances are not actionable breaches of the implied covenant of quiet enjoyment. To be actionable, the landlord's act or omission must substantially interfere with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy." (*Andrews, supra*, 125 Cal.App.4th at p. 589.)

2. *The Court's Denial of Tenant's Petition for Relief From Forfeiture Was Not an Abuse of Discretion*

A tenant may apply for relief from forfeiture of a lease pursuant to a verified petition under Code of Civil Procedure section 1179.⁹ “ ‘Under section 1179, the court in balancing the equities should take into consideration the circumstances of the case, the hardship, if any, to the lessee from the forfeiture, the hardship, if any, to the lessor from relieving the lessee from the forfeiture, the willful or other character of the breach, and then use its best discretion in determining whether relief will be granted. Its action will not be upset unless there is a clear showing of abuse of discretion.’ ” (*Thrifty Oil Co. v. Batarse* (1985) 174 Cal.App.3d 770, 777; see also *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1064 [“ ‘The matter of granting or denying such an application is one which lies so largely in the discretion of the trial court that it would require a very clear showing of an abuse of such discretion to justify a reversal of the order made thereon.’ ”].)

The trial court was presented with voluminous evidence in support of and in opposition to Tenant's petition for relief from forfeiture. Tenant presented evidence that the rental rate it was paying for the premises was substantially below the market rate and that it incurred substantial construction costs relating to the premises. Tenant's CEO George Georgiou also stated in a declaration that Tenant had a “good faith view” that the sixty-day rental abatement period started when Landlord delivered the keys, and that Tenant “was not deliberately and without reason withholding rent from” Landlord. Landlord presented evidence that Tenant had a history of being in default under the Lease

⁹ Code of Civil Procedure section 1179 provides: “The court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in [Code of Civil Procedure] Section 1174. . . . [¶] An application for relief against forfeiture may be made at any time prior to restoration of the premises to the landlord. The application may be made by a tenant . . . or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. . . .”

and that Tenant had been involved in many disputes with the Landlord over a variety of issues.

The trial weighed the evidence submitted by both sides and found that the hardship Landlord would suffer if the petition were granted was substantially greater than the hardship Tenant would suffer if the petition were denied. In reaching its decision, the court found that in light of Tenant's past conduct, "there is a strong likelihood of future defaults" by Tenant. The court also noted that Tenant did not provide a "reasonable explanation" as to why it did not obtain insurance in a timely manner or why it "did not pay rent in full every month once it had the keys." We find the trial court's analysis reasonable and well within its broad discretion.

DISPOSITION

The judgment and order denying tenant's petition for relief from forfeiture are affirmed. Landlord is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.